Supreme Court of The United States

October Term, 1978

No. 78-351

CECIL D. CLAY, HENRY E. HOLLINSHEAD, CLIFTON D. GREEN, JR., MALCOM C. HURSEY, HIRAM C. ADAMS, JAMES H. LEE, SR., CHARLES M. LANFORD, MARY R. MILLER, ALFRED WILLIAMS, Commissioners of the North Charleston Public Service District; North Charleston Public Service District, and BRANFORD HEAPE, _____ *Petitioners,*

vs.

MARION HAYWARD, DELORES GRANT, NANCY LITTLE, LAWRENCE M. LIBATER, J. PHILLIPS NOBLE, and the City of Charleston, _____ *Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioners herein pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on March 29, 1978.

OPINIONS BELOW

The March 29, 1978 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 573 F. 2d 187 (1978) and is reprinted in the Appendix to the Petition in Appendix A. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 1, 1978, and is reprinted in the Appendix to this Petition in Appendix A. The prior opinions and judgment of the United States District Court for the District of South Carolina are unreported and are reprinted in the Appendix to this Petition as Appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit (Appendix A) were entered on March 29, 1978. A timely Petition for Rehearing was denied on May 1, 1978. On July 19, 1978, Mr. Justice Brennan entered an Order extending the time for the filing of this Petition to and including August 31, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment invalidates South Carolina annexation laws which require the participation of freeholders in the qualification steps preceeding an annexation election in which only registered voters are eligible to vote.

2. Whether a Federal Court may determine that a portion of a state statute deemed to be unconstitutional may be servered from the whole without determining that severability is consistent with the intent of the state legislative body.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The validity of the following sections of the Code of Laws of South Carolina, 1962, as amended, are here involved.

§47-19.11; §47-19.12; §47-19.13; §47-19.14; §47-19.15: §47-19.16; §47-19.19

The full text of these laws are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This is a case brought under 42 U.S. C. Section 1983, challenging the constitutionality of the portion of the annexation statutes of the State of South Carolina providing for freeholder participation and approval as a condition precedent to an annexation election in which only registered voters are entitled to vote. On November 23, 1976, an election was held, pursuant to Section 47-19.11 through Section 47-19.19 of the S. C. Code Ann., to determine whether the Garden-Kiawah area should be annexed into the City of Charleston. These sections comprise one of several methods of annexation enacted into law by the South Carolina General Assembly. This method of annexation creates a several step procedure preceeding the annexation election. The first requirement is that the City Council must receive a petition signed by fifteen (15%) percent of the freeholders in the area to be annexed and certify such fact to the County Election Commission. Section 47-19.12 provides, as a further prerequisite to the election, that a referendum must be held in which all freeholders in the area to be annexed are entitled to participate. This is a substitute for Section 47-12 which requires a petition signed by fifty (50%) per cent of the freeholders in the area to be annexed and no referendum, prior to the election among registered voters.

A majority of the freeholders participating in the referendum must approve the annexation for this prerequisite to be satisfied. The statute provides that the referendum may be held

prior to or simultaneously with the annexation election. If these first two requirements are met, then the statute provides that an annexation election may be held with the registered voters in the annexing area voting in one box and the registered voters in the area to be annexed voting in a second box. The votes in each of these two boxes are recorded separately and the annexation is approved, if a majority of the registered voters in each box vote in favor of the annexation.

In this case, the City Council of Charleston received a petition signed by at least fifteen (15%) per cent of the freeholders in the Garden - Kiawah area and certified such fact to the Charleston County Election Commission. In order to save time and money, the Election Commission elected to hold the referendum and election on the same day.

The results of the freeholder referendum were as follows:
YES: 91
NO: 105

The results in the annexation election were as follows:

City of Charleston Registered Voters
YES: 2979
NO: 1039

Garden - Kiawah Registered Voters
YES: 134
NO: 103

The Respondents filed their complaint on December 6, 1976, alleging that the provisions allowing the freeholders to vote constituted invidious discrimination and was thus unconstitutional. The United States District Court for the District of South Carolina, by order dated June 9, 1977, declared Sections 47-19.11, 19.12, 19.13, 19.14, 19.15, 19.16, and 19.19 of the South Carolina Code to be unconstitutional insofar

as the sections provided for a separate freeholder referendum. It further held that all portions of such sections which did not refer to the separate freeholder referendum were severable and should remain valid and intact. The court also held that the "Garden-Kiawah" annexation was to be considered approved and enjoined the Defendants from interfering with the annexation. Summary Judgment was entered for the Plaintiffs on June 17, 1977. On June 29, 1977, the Petitioners filed a Motion in the District Court requesting an Order suspending the injunction and a stay of the judgment during the pendancy of the appeal. The District Court entered an order on July 25, 1977, denying the Petitioners' Motion.

The United States Court of Appeals for the Fourth Circuit, by decision dated March 29, 1978 and judgment entered on the same day, affirmed the holding of the District Court as to constitutionality and severability. Chief Judge Haynsworth dissented on the question of severability finding that "[s]evering the property holder vote from the statute would completely undermine the intended operation of the statutory scheme." On April 13, 1978, the petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on May 1, 1978,

ARGUMENT IN FAVOR OF GRANTING WRIT

1. WHETHER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT INVALIDATES SOUTH CAROLINA ANNEXATION LAWS WHICH REQUIRE THE PARTICIPATION OF FREEHOLDERS IN THE QUALIFICATION STEPS PRECEEDING AN ANNEXATION ELECTION IN WHICH ONLY REGISTERED VOTERS ARE ELIGIBLE TO VOTE.

The issue involved here is one of great importance to the State of South Carolina and the political subdivisions thereof, as well as many other states which, in one manner or another,

have freeholder participation in the qualification steps prior to annexation or annexation elections. The importance of the issue is accentuated by its potential effect on the orderly growth process of the municipalities and counties in the several states. The decision by the Court of Appeals in this case has cast doubt upon the entire scheme of freeholder involvment in the annexation procedure because, in any scheme requiring freeholder initiation and approval of the annexation process, the freeholders have a potential veto power by refusing to act in sufficient quantities. By making a final determination of this issue, this Court will unquestionably and substantially affect the relationship between the municipalities in many of the states and the areas surrounding them as well as the continued viability of the concept that a freeholder retains some constitutionally protected rights with respect to the movement of his property between political subdivisions.

The United States Supreme Court has been presented over the last ten years with numerous controversies covering the qualifications which various states have placed upon the exercise of the franchise in state and local elections. As a general rule, the states have "... broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter v. Northampton Election Board*, 360 U.S. 45,50 (1959).

This Court has long recognized that annexation and municipal expansion are a matter whose regulation should be left primarily to the states and their legislatures.

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them .... The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state ... The State ... at its pleasure, may ... expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest". *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-179,

In acknowledging the broad power of the individual states to regulate their subdivisions and their territorial expansions, the Supreme Court has nonetheless recognized that this power, no less than other state powers, lies within the scope of relevant limitations imposed by the United States Constitution. *Gomillion v. Lightfoot*, 364 U. S. 339, 344345 (1960). Through recognizing this limitation, the Court in *Gomillion* was careful to point out "the breadth and importance of this aspect of the state's political power" (to establish, destroy or reorganize by contraction or expansion its political subdivisions).

In *Harrell v. City of Columbia*, 216 S.C. 346, 58 S.E. 2d 91 (1950), the South Carolina Supreme Court entertained an appeal attacking various aspects of an annexation election, including the constitutionality of the annexation procedure (Section 47-12). The Court stated:

> It should be borne in mind in the consideration of all the constitutional objections raised by this appeal that the law is well settled that the annexation of territory to a municipal corporation is a *legislative* function and not a judicial one, and the following statement of the law contained in 37 Am. Jr. 639 is well supported by the authorities: 'In the absence of constitutional limitations, it is generally considered that the power of a state legislature over the boundaries of the municipalities of the state is absolute and that the legislature has power to extend the boundaries of a municipal corporation, or to authorize an extension of its boundaries, without the consent of the

> inhabitants of the territory annexed, or the municipality to which it is annexed, or even against their express protest.'

58 S.E. 2d at p. 97 cf. *Hollingsworth v. City of Greenville*, 241 S.C. 378, 128 S.E. 2d 704 (1962): *General Battery Corp. v. City of Greer*, 263 S. C. 533, 211 S. E. 2d 659 (1975); 62 C.J.S., *Municipal Corporations*, Section 41, 43, 43A; McQuillan on *Municipal Corporations*, Section 7.16, n. 60.

Neither the United States Constitution nor the South Carolina Constitution restrict the power of the legislature in authorizing an annexation election. In fact, the South Carolina Constitution, Article VIII, Section 8, indicates only that

> The General Assembly shall provide by general law the criteria and the procedures for the incorporation of new municipalities and for the readjustment of municipal boundaries and for the merger of incorporated municipalities provided that any city or town shall be organized with the consent of a majority of the electors voting in such election who reside in and are entitled by law to vote within the district proposed to be incorporated. No local or special laws shall be enacted for these purposes; provided, that the General Assembly may vary such provisions among the alternative forms of government.

The only restriction imposed by this section is the requirement that incorporation of a municipality be consented to by the vote of the electors residing in the proposed area to be annexed. *See also Whitmire v. Cass*, 213 S.C. 230, 49 S. E. 2d 1 (1948).

Pursuant to the authority granted to it to provide for annexation elections, the South Carolina General Assembly has enacted several procedures for municipal annexations. Each annexation procedure is initiated by a petition of the freeholders of the proposed area to be annexed. There are no

statutory provisions for an annexation election to be initiated in South Carolina by any person or group of people other than the freeholders in the area to be annexed. Section 47-12 and 47-14 of the S. C. Code, 1962, as amended, provide for an annexation election without a freeholder referendum to be held upon the filing of a petition signed by a majority of the freeholders requesting annexation of their property. Section 47-19.15 authorizes an annexation without an election or freeholder referendum by petition of seventy-five (75%) percent of all of the freeholders in the area to be annexed. Sections 47-19.12 and 47-19.13 authorize an annexation election to be held only after the two freeholder prerequisites are satisfied. The first prerequisite is that the City Council of the annexing municipality must certify to the County Election Commission that it has received a petition signed by fifteen (15%) per cent of the freeholders in the area to be annexed to the City. The second prerequisite to holding an election is the holding of a referendum in which all the freeholders in the area to be annexed are entitled to participate. The referendum may be held prior to or simultaneously with the actual annexation election. However, the approval of a majority of the freeholders participating in the referendum is a condition precedent to the holding of an annexation election, although many municipalities often hold the referendum and election simultaneously in an effort to save time and money. However, it is important to note that the actual annexation election, once the conditions precedent have been satisfied, involved only the registered voters of the annexing area and the registered voters of the area to be annexed, both of whom must approve the annexation. If the proposal fails to receive a majority vote in either of these groups of registered voters, the annexation will not be approved.

If, as the lower Courts held, it is impermissible to allow a freeholder's referendum as a condition precedent to the holding of an annexation election; it would stand to reason that the accumulation of freeholder petitions as the very first step in

the procedure should also be impermissible. The Respondents cannot have it both ways. If freeholder involvment is impermissible, there is no way that an annexation election can be called in South Carolina, thereby invalidating this election. The freeholder referendum is nothing more than an extension of the freeholder petition requirement. The Court should note that, in the annexation procedure created by Section 47-12 which requires a petition signed by a majority of the freeholders in the area to be annexed prior to holding an annexation, there is no freeholder referendum. In the sections under question here, the freeholder referendum is merely a part of the qualification procedure for an annexation election and not a part of the election itself. It is simply a legislative substitute for the 50% petition requirement.

As indicated above, the importance of a determination on freeholder involvement in the annexation process extends far beyond the boundaries of the State of South Carolina. No fewer than twenty eight states, in addition to South Carolina, have annexation laws that are similar to that struck down by the lower courts in this case. Although some of these annexation procedures provide also for a veto by the registered electors, many do not and, in fact, eliminate the registered electors entirely. A survey of the annexation laws of the several states shows that a majority of the legislatures of the several states have shown a concern for the interests of the property owner and secured a place for the property holder in the annexation procedure, usually, as in South Carolina, in the qualification steps prior to annexation.

In Illinois, a petition for annexation, which triggers municipal action or an election among the registered electors in the area to be annexed,must be executed by a majority of the owners of record of land in such territory and a majority of the electors residing in the territory. *Illinois Annotated Statutes*, Title 24, §7-1-2. For an area containing more than one square mile in area and more than five hundred inhabitants, Illinois provides for a petition signed by no less than one hundred (100)

electors and owners of record of more than fifty (50%) percent of the territory to be annexed. This petition must be submitted to the county circuit court which then orders an election among the electors in the area to be annexed. §7-1-11. This is very similar to the South Carolina procedure in that each requires property owner approval prior to holding an annexation election among the registered electors. §7-1-12 provides for the annexation of property wholly bounded by two municipalities into one of those municipalities solely by municipal ordinance upon the petition of only a majority of the owners of record of land.

In Kentucky, a first class city may annex unincorporated territory solely by ordinance unless protested by seventy-five (75%) percent of the freeholders of the territory to be annexed. *Kentucky Revised Statutes*, §81.100. The registered electors have no right of protest or participation. A second class city may annex by ordinance unless protested by fifty (50%) percent of the freeholders. §81.140. However, fourth class city may annex territory unless a protest is filed by a majority of the resident voters in the territory to be annexed. §81.220. Additionalhy, in a county with both a second class city and third class city, twenty-five (25%) percent of the freeholders of the area annexed to a second class city may petition for an election among the qualified voters, which requires a seventy-five (75%) percent rejection to void the annexation. §81.145.

§9.471 of the *Arizona Revised Statutes* provides for the annexation of territory into a city or town by ordinance upon the petition of owners of not less than one-half in value of the real and personal property that would be subject to taxation by the city or town in the event of annexation. Here there is no provision for any participation by the registered electors.

§69-904 of the *Code of Georgia* provides that a municipality may annex territory by ordinance upon the petition of sixty (60%) percent of the electors resident in the area and owners of

not less than sixty (60%) percent of the land area, by acreage, included in such petition.

Arkansas provides for the annexation of property contiguous to a city upon the petition to the county court of a majority of the real estate owners in the area to be annexed. §19-301, *Arkansas Statutes, 1947, Annotated.* The petition is then subject to court and City Council approval.

Title 33, §151 of the *Louisiana Revised Statutes* provides for an election on the question of annexation only upon the petition of from one quarter to one half in number and value of owners of the land to be annexed, the percentage depending upon the population of the parish in which the land lies. A further method of annexation (§172) provides that no ordinance enlarging the boundaries of a municipality shall be valid unless consented to in writing by a majority of the registered voters and a majority in number of the resident property owners as well as twenty-five (25%) percent in value of the property in the area to be annexed. In Louisiana, as in the states listed above, annexation is contingent upon the approval of a portion of the property owners, and there is no action which can be taken by the registered electors to overcome the veto effect of the lack of approval by the requisite number of property owners.

Maryland allows for the initiation of annexation proceedings by legislative body of the municipality but only with the consent of at least twenty-five (25%) percent of the registered electors and owners of at least twenty-five (25%) percent of the assessed value of the property in the area to be annexed. The proceeding may also be initiated by petition to the legislative body, signed by the same percentage of registered voters and property owners. There is provision for an election in the area to be annexed but only after the resolution has been enacted annexing the territory. As in the South Carolina statute declared unconstitutional by the lower courts, the property owner approval is one of the conditions precedent to the enactment of

the annexation resolution, and consequently a condition precedent to the election. *Annotated Code of Maryland*, 1957, Article 23 A, §19.

Michigan Compiled Laws Annotated, §117.6 provides that annexation proceedings may be initiated by the petition of qualified electors who are also freeholders. *Minnesota Statutes Annotated*, §414.031 allows for initiation of the annexation proceeding by the petition of twenty (20%) percent of the property owners or 100 property owners, whichever is less, in the area to be annexed. There is no provision for an election among the registered voters unless the petition has been executed by less than a majority of the property owners. §414.033 provides for annexation by ordinance upon the petition of a majority of the property owners.

The *New Mexico Statutes, 1953*, §14-7-1 *et seq* provide still a different method of annexation. However,the freeholder involvement is similar to a number of other states. The annexation decision is made by a seven member arbitration board made up of three members appointed by the annexing municipality, three members elected from the area to be annexed, and a seventh member selected by the other six. The key feature to this method is that all seven members of the arbitration board must be landowners. There is also a boundary commission method of annexation (§14-7-11) which must be initiated by the petition of a majority of the landowners of the territory proposed to be annexed. The final method of annexation is annexation by ordinance upon the petition of the owners of a majority of the number of acres contiguous to the city (§14-7-17).

In addition to the states referred to above, there are a number of other states which have similar requirements for freeholder participation and approval of the annexation process. These states invariably require the freeholder approval either simultaneously with certain registered elector participation or

as a condition precedient to any elector involvment. A final annexation method, which is common to many states and which favors the freeholder to the total exclusion of the registered voters, is the enactment of an annexation ordinance by the annexing municipality upon the petition of one hundred (100%) percent of the landowners in the area to be annexed regardless of the number of registered electors residing therein. Among the states which have adopted this procedure are South Carolina (§47-19.5), Georgia (§69.901), Florida (§171.044), Arkansas (§19-330), Iowa (§368.7), Alabama (§11-42-21), Missouri (§71.012), North Carolina (§160 A-31) and Wyoming (§15-1-507).

This outline of annexation methods in a number of states is not exhaustive and does not contain necessarily the only annexation method in a particular state. However, the list is illustrative of the pervasiveness of freeholder involvment in the municipal annexation process in the United States. In all of these methods the freeholders are either involved to the total exclusion of the electors or have an effective veto over elector participation. All of these states continue to allow annexation under these statutes which annexations might well be deemed improper under the ruling of the Court of Appeals in this case. Because of this and the need for stability in the annexation process we feel that it is necessary for the court to act in this matter to determine the permissible limits of freeholder participation in the steps leading up to annexation or an annexation election.

In assessing the constitutionality of the South Carolina statutes pertaining to the attempted annexation of the Garden Kiawah area by the City of Charleston, this Court should take into consideration the principles expounded in the *Hunter* and *Gomillion* decisions. Indeed, when called upon to pass upon the validity of state annexation statutes and equal protection objections thereto, the federal courts have, for the most part, recognized the special nature of annexation and its peculiarly

state and local character. In *Adams vs. City of Colorado Springs*, 308 F. Supp. 1397 (D. Colo. 1970), voters and property owners in the unincorporated area, which was the subject of annexation, challenged the constitutionality of Colorado statutes which granted rights to vote on the annexation issue to citizens in areas with less than two-thirds contiguity with the city but denied same where the area to be annexed had greater than two-thirds contiguity with the annexing municipality. In denying the Plaintiff's claim that such statutory qualifications resulted in an infringement of their voting rights on equal protection grounds, the court held that the provisions in question were a proper exercise by the state of its "broad discretion in determining the procedures for annexation by municipal corporations of unincorporated territory". This decision was affirmed by the United States Supreme Court. 399 U.S. 901, (1970).

Challenges to state annexation election procedures have been made in several other jurisdictions on the grounds that the provisions in question resulted in the unconstitutional disenfranchisement of citizens in the area to be annexed. In each instance, as in *Adams*, the courts have taken the position that the equal protection test should be applied rather than the test used where the classification deals with a "fundamental right" (voting). See: *Murphy v. Kansas City, Missouri*, 347 F. Supp. 837 (W.D. Mo. 1972); *Doyle v. Municipal Commission of State of Minnesota*, 340 F. Supp. 841 (D. Minn. 1972), aff'd 486 F. 2d 620 (8th Cir. 1972); *Duncan v. Town of Blacksburg, Va.*, 364 F. Supp. 643 (W. D. Va. 1973); *Citizens Comm to Oppose Annexation v. City of Lynchburg* 400 F. Supp. 68 (W.D. Va 1975). Probably the clearest expression of this principle is found in the case of *Thompson v. Whitley*, 334 F. Supp. 480 (E.D.N.C. 1972). Here, the Plaintiffs, residents of the annexed area, brought an action challenging the constitutionality of the North Carolina statutory election scheme which denied the right to vote on annexation issues to residents in an area adjoining a municipality of less than 5,000 residents while

granting said right to citizens residing contiguous to cities with populations in excess of 5,000. The Plaintiffs claimed that these procedures, were discriminatory .and resulted in an unconstitutional denial of Fourteenth Amendment Equal Protection. In discussing the Plaintiff's equal protection claim, the court rejected Plaintiff's contention that it apply the stricter equal protection standard applicable to classifications affecting fundamental rights such as voting. Unlike the fundamental right to vote in elections for local and national officers and other elections relating to direct participation in the political process, a right determined to be "fundamental" by the U. S. Supreme Court, the right to vote in an annexation referendum, the court determined, is not a fundamental right in that it "does not relate except indirectly to participation in representative government". Accordingly, the court determined that the proper test was not whether the statutory scheme promoted a compelling state interest, but rather whether the statutues resulted in classifications "without a rational basis", the traditional standard of equal protection review. Further, in passing upon the Plaintiff's challenge to the North Carolina annexation statutes, the *Thompson* court cited the firmly established principles that the test for determining whether a state statutory scheme violates equal protection is "whether the classifications drawn . . . are reasonable in light of its purpose . . .," *McLaughlin v. Florida*, 379 U.S. 184, 85 S. Ct. 282 (1964), and that usually "the presumption of reasonableness is with the state. *Salsbury v. Maryland*, 346 U.S. 545, 74 S. Ct. 280 (1954). After reviewing the statutes being challenged and classifications created therein, the court determined that, although they lacked abstract symmetry and contained theoretical inconsistencies, they nonetheless rested upon a rational basis within the knowledge and experience of the legislators.

Applying the foregoing considerations to the instant case, Petitioners submit that the South Carolina annexation statutes in issue, S.C. Code Section 47-19.12, 19.15, and 19.19, and

portions of Sections 47-19.11, 19.12, 19.13, 19.14, and 19.16, are not unconstitutional.

It must be pointed out that these provisions deny no one in the proposed annexation area the right to vote. The cases clearly show that the registered voters in the area to be annexed have no constitutional right to vote on the annexation question if the South Carolina General Assembly had been so minded. Instead of being totally disenfranchised, the registered voters of the area to be annexed were given the right to approve or veto annexation as were the registered voters of the annexing municipality. Under the South Carolina system, no one group may unilaterally approve and effect annexation. Since the registered voters in the area to be annexed have no constitutional right to vote at all, it is very difficult to see where they have had any constitutional rights infringed by the inclusion of another group of voters in the qualification steps prior to the annexation election.

The Respondents have attempted to describe these statutes as giving the freeholders in the area to be annexed the right to veto the annexation. This is an inaccurate interpretation of the role of the freeholders because, as noted above, the freeholders are only part of the qualification procedure and have no vote in the annexation election. It so happens that the freeholders referendum yielded a result that was opposed to the annexation drive. Exactly the same result would have been reached in this situation, if the proponents of annexation had been unable to secure the signatures of fifteen (15%) per cent of the freeholders in the area on the annexation petition. There is no other way to initiate any annexation drive in South Carolina except through the action of the freeholders. The City Council is unable to act on annexation in any respect without some action by the freeholders. If this Court should find that the provision for a freeholder referendum as a prerequisite to an annexation election is unconstitutional, then there can be no question but that the freeholder petition prerequisite is also unconstitutional

as giving the freeholders the right of veto, only requiring a larger percentage of opposition. With these two steps declared unconstitutional, the election must be voided as there would be no mechanism in the law of South Carolina for initiating an annexation election.

The Respondents submit that this case can be decided for the Respondents, consistently with the line of cases decided by the United States Supreme Court, which culminated with *Hill v. Stone*, 421 U. S. 289 (1975). In 1969 and 1970 the Supreme Court rendered three decisions holding invalid state laws which selectively granted the right to vote on grounds that they denied equal protection under the Fourteenth Amendment. In *Kramer vs. Union Free School District No. 15*, 395 U. S. 621 (1969), the Court struck down a New York statute which granted the right to vote in a local school board election only to those who owned or leased taxable real property in the district or were parents or custodians of children enrolled in the public schools. At the same time the Court decided *Cipriano v. City of Houma* 395 U. S. 701 (1969), which invalidated a Louisiana statute permitting only property owners to vote on the question of approving bonds that were to be financed exclusively from the revenues of a municipal public utility. The third case was *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), in which an Arizona constitutional limitation of the franchise in general obligations bond elections to persons who were qualified electors and also real property taxpayers was held to be a denial of equal protection. In *Hill v. Stone*, the Supreme Court invalidated a law which required that a bond issue be approved by a majority of those voting in the renderers (property taxpayers) box and by a majority of all ballots cast by the renderers and the registered voters who voted in a separate box.

It is clear that the facts in this case bear no reasonable resemblance to the facts of the Supreme Court cases cited. The cases quoted earlier clearly show that annexation is a creature

of statute and that the states should be given broad discretion in determining the ground rules for such elections. These decisions have determined that the right to vote in an annexation election is not a fundamental right, requiring a showing of compelling state interest.

In determining whether or not there is a rational basis for the statutory scheme of annexation in South Carolina, it is necessary to look at the nature, extent and effect of an annexation election. With the exception of the *Kramer* decision, the cases cited by the Plaintiff deal with the issuance of revenue and general obligation bonds which would benefit the community as a whole. However, these types of votes bear no relation to an annexation election. It is not unreasonable to conclude that, in drafting the scheme for annexation, the South Carolina General Assembly concluded that the effects of annexation would fall not only upon the residents of the area but also upon the property owners.

The property owners have a very genuine concern as to whether their property is to be protected by the police from the City of Charleston or the County of Charleston, whether their property is to be protected by the fire department of the City of Charleston or the North Charleston Public Service District, whether their governing ordinances are to be enacted by the City Council of Charleston or the Charleston County Council, and whether or not their sanitation services are to be provided by the City of Charleston or the North Charleston Public Service District. Taxes are only one of the considerations in this case whereas it was the predominant issue in the cases cited by the Plaintiff. It is apparent that the property owners have a very vital stake in this election and there is no rational basis for denying them a role in the procedure.

In reviewing the earlier line of Supreme Court cases, there can be no question but that the South Carolina annexation procedure differs drastically from all the prior procedures in

that no group of voters is disenfranchised nor is any group of voters treated unequally. The freeholders' only role is in the qualification procedure for the annexation election. Only the registered voters in the annexing city and the area to be annexed vote in the annexation election and each group has a veto regardless of the size or distribution of the vote in the other box. Neither group of registered voters is disenfranchised because they have votes of equal weight in an annexation election, and the freeholders have no vote at all. In essence, the registered voters have the final voice and may pass or veto an annexation regardless of any prior approval of the freeholders. Theirs is the final say, after which the annexation is complete or vetoed regardless of the total or percentage of freeholder approval in the qualification steps.

In an earlier brief, the Respondents have cited *Cothran v. West Dunklin Public Sch. District No. 1-C*, 189 S. C. 85, 200 S.E. 95 (1938) for the proposition that the South Carolina Supreme Court had declared this freeholder involvement to be unconstitutional. However, a review of the case and a look at recent history shows the inaccuracy of that reliance. Firstly, South Carolina municipalities have been annexing surrounding territories pursuant to the procedure in question here, including the freeholder involvement, during the thirty-nine (39) year period between *Cothran* and the first decision in this case. Secondly, *Cothran* was resolved solely upon a interpretation of the term "elector" as found in Article 2, Sections 3 and 4 of the Constitution of South Carolina. Section 3 provided that every male citizen over the age of 21 years, possessing the qualifications required by the Constitution, shall be an elector. Section 4 provided that an elector appearing to vote must produce his certificate of registration and a tax receipt showing the payment of all taxes thirty days before such election.

The act in question in *Cothran* (Act No. 102, of the General Assembly, approved March 13, 1933) provided that before one

could vote in an *election* for school bonds in Greenville County, he must show that he returned real or personal property for taxation within the school district. It is interesting to note that the act further provides that the election may not be held, "except upon the written petition or request of at least a majority of the resident electors, and a like proportion of the resident freeholders of the age of twenty-one (21) years to determine whether said bonds shall be issued or not." 200 S.E. at 95.

The Court in *Cothran* approved the participation of the freeholders in the qualification procedure. The election was held pursuant to Section 5359 of the 1932 Code of Laws rather than Act No. 102. The litigation arose upon a complaint to enjoin the issuance of the bonds because the question was not submitted only to those electors who returned property for taxation.

As regards Section 5359, the court held that

> It appears from the petition, and the return of the respondents to the rule to show cause . . . , that the election on the question of issuing the bonds was regular in all essential preliminaries, under Section 5359 of the Code of 1932.

Section 5359 of the Code of Laws for South Carolina, 1932, provided, in part, as follows:

> That the question of issuing the bonds authorized in this section shall be first submitted to the qualified voters of such school district at an election to be held *upon the written petition or request* of at least one-third of the resident electors *and a like proportion of the freeholders of the age of twenty-one years,* to determine whether said bonds shall be issued or not. (Emphasis added).

Cothran was directed only at freeholder involvment in the election itself. It is clear that the South Carolina Supreme Court found no prohibition on freeholder involvement at the qualification stage.

This is identical to the situation involved in the Garden-Kiawah annexation. As indicated, the freeholder does not and has never, under the South Carolina annexation procedure, voted in the annexation election. The freeholder merely participates in the qualification procedure. The only question presented to the freeholder is whether an annexation election should be held. This is the same question presented to the fifteen (15%) percent of the freeholders in the area to be annexed who sign petitions. This smaller group has the same veto power as the larger group of freeholders because there can be no freeholder referendum without a petition signed by fifteen (15%) percent of the freeholders.

The South Carolina General Assembly has done nothing more than create a two-step qualification procedure prior to the holding of an annexation election in which only registered voters vote. We submit that the petition step cannot be separated from the referendum step, as both are conditions precedent to the holding of the annexation election. The final voice as to approval or rejection of the annexation movements lies with the only one group, the registered voters.

In addition there is no language in the Supreme Court cases which show an intent to eliminate the property owner from the voting process. In fact quite the opposite is true. In *Cipriano* the Court noted that: "Of course these differences of opinion cannot justify excluding either group (property taxpayers voters and non-property owners voters) from the bond election, when as in this case, both are substantially affected by the utility operation". 395 U.S. at p. 705. The Court made a similar statement in *Phoenix:*

> The differences between the interests of property owners and the interests of nonproperty owners are not sufficiently substantial to justify excluding the latter from the franchise. This is so for several reasons.
>
> First, it is unquestioned that all residents of Phoenix, property owners and nonproperty owners alike, have a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election at issue in this case. Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. Arizona nevertheless excludes nonproperty owners from participating in bond elections and vests in the majority of individual property owners voting in the election the power to approve or disapprove facilities that the municipal government has determined should be financed by issuing general obligation bonds. Placing such power in property owners alone can be justified only by some overriding interest of those owners that the state is entitled to recognize.

399 U.S. at p. 209.

These cases indicate clearly that the Supreme Court has not mandated the exclusion of freeholder voting but has refused to allow a disfranchisement based on property or unequal voting weight. The South Carolina statute has neither of these difficulties. The Court has not found that freeholders have no interest in these elections but has merely required that nonfreeholders be treated equally. We submit that the South Carolina annexation procedure raises a question of novel impression which is not governed by the holding in *Hill* but which can be decided in favor of the Petitioners consistently with *Hill* and the line of cases beginning with *Hunter vs. City of*

Pittsburgh, 207 U.S. 161 (1907).

Not only did the General Assembly act reasonably in allowing the freeholders in the area to be annexed to have a say in the outcome, but we submit that this requirement was included in the law to prevent the type activity used by the City of Charleston in this election. The City initially divided the area to be annexed into three areas (A, B & C). All three areas were contiguous to one another and could have been included in one area to be annexed. However, the city chose not to do so. Prior to the election because of substantial allegations of fraud, the City cancelled its attempt to annex Area C.

The evidence provided by the City shows clearly the lopsided rejection of annexation in Section B. We submit that the City intentionally drew the annexation lines in such a manner as to include within Section A a very small number of residents but a very large portion of the tax base and area of the North Charleston Public Service District. The population of the entire District is approximately 55,000 while the population of Section A is approximately 2250,or four (4%) percent (figures from Berkeley-Charleston-Dorchester Council of Governments). In contrast to this is the fact that the entire District covers 30.2 square miles while Section A covers approximately 3 square miles or ten (10%) percent of the total land area (figures from Berkeley-Charleston-Dorchester Council of Governments). Finally, the assessed value of the real property within the District is approximately Twenty-Nine Million ($29,000,000.00) Dollars, while the assessed value of the real property within Section A is estimated to be three million ($3,000,000.00) Dollars or Ten and 3/10 (10.3%) percent.

There can be no question but that the City has tried to draw lines in such a way that a small group of citizens can provide them with a windfall as far as their increased tax base is concerned. Since almost all of the valuable taxable property in Section A is commercial, the position of the City and the lower

courts is that these commmercial property owners must suffer their fate silently and without the opportunity to voice their position in the outcome.

We do not question the City's right to draw the lines any way that they see fit. However, there is no question but that the freeholders have a substantial interest in annexation and there can be no rational basis for disenfranchising them. The South Carolina General Assembly obviously saw their interest and allowed them to participate in the annexation procedure. The Respondents have offered no evidence that the classifications created by these statutes, in the qualification steps, are unreasonable and without rational basis. Accordingly, these provisions, as mandated by the South Carolina General Assembly, should be upheld. It must be remembered that the freeholders only participate in the qualification procedures and not in the annexation election. It is obvious that the South Carolina General Assembly devised the annexation system in question here ,in order to aid cities in annexing surrounding territory because of the burden that would be placed upon the cities to obtain the signatures of more than fifty (50%) percent of the freeholders, as required by Section 47-12. Under both procedures, the annexation election is conducted among only the registered voters of the annexing city and the area to be annexed and theirs is the ultimate and final decision. The freeholders participate only in the qualification procedures. There is no basis for excluding them from their participation as the lower courts have done. They certainly have a stake in the outcome which should not be ignored.

2. WHETHER A FEDERAL COURT MAY DETERMINE THAT A PORTION OF A STATE STATUTE DEEMED TO BE UNCONSTITUTIONAL MAY BE SEVERED FROM THE WHOLE WITHOUT DETERMINING THAT SEVERABILITY IS CONSISTENT WITH THE INTENT OF THE STATE LEGISLATIVE BODY.

The issue of severability presented herein is also one of great importance not only to the State of South Carolina, but also to the forty-nine other states. Legislatures and Courts have been concerned for many years about the division of their authority and each has jealously guarded their domain. A number of cases have been decided by this Court and by local Courts, interpreting South Carolina law outlining the specific criteria to be used in determining whether or not a portion of a statute may be separated from the whole. The District Court and the Court of Appeals in this case decided the issue of severance in a manner that is wholly inconsistent and in conflict with the decisions of this Court, and with the decisions of the Supreme Court of South Carolina and clearly violative of the concept of states' rights upon which our entire system of constitutional government is founded. The lower courts have in effect drafted a new annexation law for the State of South Carolina in a manner which is in total disagreement with the declared intent and purpose of the South Carolina General Assembly in enacting the original annexation laws. This question is of extreme importance to the citizens of the State of South Carolina as they have a right to be assured that legislation which governs their lives and property will be enacted by their duly elected representatives in the State Legislature and not by the courts.

The various cases which have been decided on this issue indicate that, before a court may sever a portion of a statute, when some of the provisions of that statute have been declared unconstitutional, the court must determine whether the legislature intended the statute to be an integrated unit or whether the legislature had forseen and intended the provisions of the statute to be severable. The key and determining issue is the intent of the legislature with respect to the statute in question.

In *Gordon v. Executive Committee of the Democratic Party of City of Charleston*, 335 F. Supp. 166 (D.S.C. 1971) the court

allowed severability but specifically found that severability was permissible because it was consistent with the legislative purpose.

> The real intent of the statute now under consideration was to prevent a voter from participating in nominating primaries of two parties in the same election. That purpose is obvious from Section 400.70, which, unlike Section 400.71 which merely provides the voter's oath, proscribes specifically a voter's participation in more than one primary election, preliminary to the same general or special election. That purpose can be sustained, without giving effect to the concluding phrase in Section 400.71 which, as we have already observed, is unconstitutional. Exercising its unconstitutional limitation, Section 400.71 would, by the terms of the oath thereby required, only deny to the voter the right to participate in two primary elections preliminary to the same general or special election. When the statute is thus restricted within its constitutional limits, it accords with the ruling of the City Democratic Executive Committee, harmonized with Section 400.79, and will not invalidate the challenged voters from properly exercising their suffrage in the primary election. The action of the election managers and of the Executive Committee thus did not represent a change from the statute, as restricted to its constitutional limits.

335 F. Supp at 169.

This case involved a South Carolina statute which prohibited a person from voting in one party's primary election if that person had voted in the primary election of another party within the past year.

The case of *U. S. vs. Jackson*, 390 U. S. 570 (1968), cites many of the earlier cases which indicate that there is no presumption

in favor of severability and that the Courts must look to the legislative intent. The *Jackson* case involved a federal kidnapping statute which contained an unconstitutional death penalty provision. While thoroughly analyzing the history of the kidnapping legislation, the court noted that, in order to create a presumption of severability, an express statutory provision was not necessary but that any presumption must arise out of the legislative intent of the statute at issue.

In *Pollock v. Farmers' Loan & Trust Co.* 158 U. S. 601 (1894), the Supreme Court refused to employ severance in a taxing scheme stating that, absent an analysis of the legislative intent, there can be no presumption in favor of severability. In the case of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362 (1893), the Court allowed the severance of valid state regulatory powers of railroads from unconstitutional penalty provisions, after analyzing the legislative intent as follows:

> It is not to be presumed that the legislature was legislating for the mere sake of imposing penalities, but the penalties . . . were simply in aid of the main purpose of the statute.

154 U. S. at 396.

In *Electric Bond Share Co. v. SEC*, 303 U. S. 418 (1938), the Court stated that ordinarily there is a presumption in favor of inseparability but held that where there was a specific provision in the statute calling for severance, "this provision reverses the presumption of inseparability." 303 U. S. at 434.

In addition to these cases, there have been several recent federal cases dealing with the issue. In *Sloan v. Lemon*, 413 U. S. 825, (1973), the court struck down a Pennsylvania law which aided parents who sent their children to private schools. The act provided such aid to *all* parents sending their children to private schools whether such schools were church related or

not. Two parents, whose children attended nonsectarian schools, on appeal, attempted to have the court sever aid to parents with children in church related schools allowing those parents sending their children to non-sectarian schools to continue to receive aid. They argued that the Establishment of Religion issue should strike down only that portion of the act aiding parents of parochial school children. In rejecting this argument, the court stated:

> *Although the Act contained a severability clause* . . . it could not be assumed that the legislature would have passed the law to aid only those attending the relatively few non-sectarian schools . . . The statute nowhere sets up this suggested dichotomy between sectarian and non-sectarian schools, and *to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted.*

413 U. S. 834 (Emphasis Added).

This case clearly shows that the intent of the state legislature will not only be analyzed but will also be strictly scrutinized even to disregarding the legislature's own statement of intent in favor of severability. The courts should refuse to entertain any idea of severance without first determining that to do so would have been the intent of the legislature. There is no case which supports the idea that a portion of a statute may be severed without reference to the intent of the legislative body which enacted the statute.

In addition to these federal cases which establish the test for severing a portion of a statute, there are a number of South Carolina cases which also evidence the requirement that the legislative intent be examined prior to deciding whether severance is permissible. In *Ellison v. Cass* 241 S. C. 96, 127 S. E. 2d (1962), a state statute which authorized the construction of private parking facilities over public sidewalks but

precluded construction over a roadway in the state highway system was found unconstitutional insofar as it allowed construction over the road. The Court rejected the argument that, even though the provisions with respect to encroachment over State Highways were unconstitutional, the remainder of the act was severable. The court held that:

> It is true that that which remains might be completely independent of that which is rejected. However, before we could . . . apply the rule of separability, the remainder would have to meet the other test. Is it of such character that we may fairly presume that the legislature would have passed it independently of that which is in conflict with the Constitution.

127 S. E. 2d at 209.

In making its finding, the court cited *Dean v. Timmerman* 234 S. C. 35, 106 S. E. 2d 665 (1959) which held:

> The question as to whether portions of a statute, which are constitutional, shall be upheld, while other divisible portions are eliminated, is regarded as primarily one of legislative intent.

106 S. E. 2d at 669.

The *Ellison* decision also cited the case of *Townsend v. Richland County*, 190 S. C. 270, 2 S. E. 2d 777 (1939) which held:

> The rule is that where a part of a statute is constitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the legislature intended them as a whole, and if they cannot be carried into effect, the legislature would not have passed the residue independently of that which is void, the whole act is void.

2 S. E. 2d at 781.

An additional South Carolina case which further illustrates this point is *Lee v. Clark* 224 S. C. 138, 77 S. E. 2d 485 (1953) which held unconstitutional a statute providing for a Board of nine trustees of a particular school district, not less than three of whom shall be women. The appellants attempted to sever a portion of the statute, arguing that the primary purpose of the act was to create a board of trustees of nine members, in lieu of a board of five members as provided by the general state law, and that the requirement that there be three women on the board was a secondary consideration. In denying the severance, the Court quoted the above passage from *Townsend* and held that

> We do not think under the foregoing text that the unconstitutional part is separable. To sustain appellant's contention would be tantamount to materially amending the act which, of course, we are not at liberty to do.

77 S. E. 2d at 490.

It is interesting to note that the court in *Lee* voided the election even though the three women who were elected to the Board received sufficient votes to be elected, had there been no requirement covering women trustees. The court noted that:

> In conclusion, it should be stated that the appellants who are women received not only a majority of the votes cast for women but the majority of all votes cast in said election. But this fortuitous circumstance has no bearing on the validity of the act under which they were elected.

77 S. E. 2d at 491.

Although there is no requirement that there be a severability clause in the statute in question for a court to apply the doctrine, the absence of such a clause, as in the annexation laws, has been held to be of evidentiary value. In *Family Security Life Ins. Co. v. Daniel*, 79 F. Supp. 62 (D.S.C. 1948), the South Carolina District Court held that:

> In view of the modern form of legislative drafting, the omission of such a provision evidences clearly the legislative intent that this statute must stand or fall as a whole.

79 F. Supp. at 64.

A further South Carolina case which illustrates this doctrine is *Bramlette v. Stringer* 186 S. C. 134, 195 S. E. 257 (1937) in which the South Carolina Supreme Court considered a statute which authorized Greenville County to borrow money for highway construction but left the amount to be borrowed and the use of the proceeds to the discretion of the county legislative delegation. The Court found the part of the statute giving the legislative delegation executive type powers to be unconstitutional but refused to sever that portion of the statute which authorized the county to borrow money, although there was no showing that the County Council could not adequately supervise the program. It is clear from this decision that the court felt that the intent of the legislature was to build roads at the discretion of the county legislative delegation rather than to merely build roads.

The *Cothran* case cited earlier has been cited for the principal of severance. However, the facts of the case do not lend themselves to such an interpretation. There the election was submitted only to the qualified electors of the School District and was carried by the votes of a majority of them. In fact the court held that "the election on the question of issuing the bonds was regular in all essential preliminaries under

section 5359 of the Code of 1932". 200 S. E. at 95. The petitioners challenged the legality of the election because the question *was not* submitted to only those electors as return real or personal property for taxation as required by Act No. 102 of the General Assembly, approved March 13, 1933. Both parties conceded that if Act No. 102 was constitutional, the election was null and void.

The Court did not sever a portion of the statute but declared the entire act unconstitutional, as follows:

> We are convinced that the provision of the Act of 1933, supra, which limits the right of voting at an election in Greenville County . . . to those qualified electors who hav returned real or personal property for taxation, violates the provisions of the Constitution . . . and *makes the Act unconstitutional.* 200 S.E. at 97. (Emphasis added).

The Court further held that Act No. 102 had no application to the election held on September 19, 1938. That was the reason for the court's holding the election to be valid and the bonds lawful rather than any issue of or reliance on severability.

The case of *Parker v. Bates.*, 216 S. C. 52, 56 S. E. 2d 723 (1949) is noteworthy in that the South Carolina Supreme Court again reiterated the general principles of severability although severance was allowed on a very narrow basis.

The statute in question in *Parker* involved the appropriation of certain surplus funds to the counties of the state for seven specifically enumerated types of hospital or health care facilities. However, the Act contained an eighth clause which read "(h) and/or for other public uses." 56 S. E. 2d at p. 725. The court specificially found that

> The legislative purpose is not evident to make a blanket grant in aid of the counties . . ., and the appropriations here

> cannot fairly be taken to be such, but is one, as seen, for aid of the counties in solution of the problem of public health. Item (h) is foreign to the manifest purpose of the act and for that reason invalid.
>
> * * *
>
> In the act before us the legislature set out to itemize, which was done to include seven kindred specified uses or purposes, but all of that careful handiwork would be undone by sustention of the alternative, incongruous appropriation for "other public uses."

56 S. E. 2d at p. 728.

The court then held that Item (h) could be severed from the Act, thereby allowing the remainder of the Act to stand. "The legislature itself has separated the items which we hold void and, without it, the Act is entirely complete and capable of being executed *in accordance with the legislative intent*." 56 S. E. 2d at 730. This is precisely the standard which the Respondents feel must be applied to the severance question on the annexation statute or any other statute.

It should be noted that this was a 3-2 decision with a very active dissent written by Mr. Justice Oxner who recited in greater detail the law of South Carolina on the question of severability. As did the majority, he wrote that "the ultimate inquiry is the intent of the lawmakers." 56 S. E. 2d at p. 733. The justices on each side of this decision did not disagree as to the law on severability in South Carolina but disagreed as to the legislative intent on the particular bill in question.

It is clear that the intent of the South Carolina General Assembly, in creating annexation laws for the State of South Carolina, was to give the freeholders a major voice in the issue of annexation of their property. The legislature did not create an annexation scheme which did not give a role to the

freeholders in the area to be annexed. If the Court were to eliminate the freeholders referendum and allow an annexation election upon the petition of fifteen (15%) percen tof the freeholders this would fly in the face of the specific intent of the legislature as expressed in Section 47-12 and 47-14. These sections allow an annexation election without a freeholder's referendum upon the petition of a majority of the freeholders within the area to be annexed.

There is clearly no basis in the annexation legislation or the legislative intent for severing the freeholder referendum and allowing an election upon the petition of fifteen (15%) percent of the freeholders. To eliminate the method of annexation that was used in this case would not leave South Carolina without an annexation law. There would remain several other methods of annexation including the election held pursuant to the signature of a majority of the freeholders in the area to be annexed (Section 47-12 and 47-14) and the enactment of an ordinance by the municipality after petition by at least seventy five (75%) percent of the freeholders in the area to be annexed (Section 47-19.5). This latter method requires neither referendum nor election. Our law also provides for the annexation of property when the entire area to be annexed belongs to either the county or the municipality or when the entire area proposed to be annexed belongs to a corporation or when the entire area belongs to a school district or the State or Federal Government. (Section 48-18.1 through 47-19.2). Therefore, it is clear that, if the court were to invalidate the procedure in question here, municipalities would be able to annex territory prior to the enactment of new legislation, if any, by the legislature.

The essence of these statutes is to give the freeholder in the area to be annexed some control over the movement of his property from one jurisdiction to another. Our legislature has the prerogative and has chosen not to make municipal annexation an easy project. To sever the referendum requirement from the fifteen (15%) percent freeholder petition

method and allow an election only upon that percentage of petitions, would clearly frustrate the intent of the legislature. This procedure is a unified one and the steps involved are inseparable. The South Carolina General Assembly has specifically considered the issue of calling for an annexation election solely by freeholder petition without a freeholder referendum and determined that such petitions should be signed by a majority of the freeholders in the area to be annexed, not the fifteen (15%) percent called for by the lower courts.

The South Carolina General Assembly has clearly manifested its intent. Annexations elections initiated by petition alone must be signed by a majority of the freeholders in the area to be annexed, not by merely fifteen (15%) percent of the freeholders in the area to be annexed as ordered by the lower courts. The lower courts, in this case, have gone further than excising the unconstitutional portion of South Carolina's annexation law. They have created a new procedure for calling an annexation election. We submit that the lower courts' presented no reasoning as to legislative intent because that legislative intent is clear; and the lower court decisions are contrary to the intent of the legislature in drafting the South Carolina annexation laws and contrary to the criteria established by this Court and the South Carolina Supreme Court on a number of occasions. A review of the lower court decisions herein will show that the District Court did not rely on any case law or determination of legislative intent in allowing severance. The majority of the Court of Appeals panel upheld the District Court's purported reliance upon two cases which which the District Court did not in fact, rely upon. The District Court relied upon no cases. Neither the District Court nor the Court of Appeals has made or even hinted at a determination of legislative intent. However, Judge Haynsworth, in his dissent, discussed the question of legislative intent in great detail and determined that severance was improper and that a legal annexation was not effected by the

vote, leaving further annexation proceedings to be conducted under any statute which might be enacted subsequently by the South Carolina General Assembly.

CONCLUSION

This Petition raises issues of fundamental importance both to the territorial annexation system of the states and their political subdivisions, and to the citizens of the several states who rely on their knowledge that they will be governed by laws created and passed by their duly elected legislative bodies. Therefore, it is submitted that the questions presented by this Petition are so substantial that a Writ of Certiorari should be granted.

Respectfully submitted,

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Charleston Hts., South Carolina 29405

APPENDIX A

Judgment, Opinion and Denial of Petition for Rehearing of the

United States Court of Appeals for the

Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2028

MARION HAYWARD, DELORES GRANT, NANCY LITTLE, LAWRENCE M. LIBATER, J. PHILLIPS NOBLE, JR., and the City of Charleston, ——— *Appellees,*

-*v*-

CECIL D. CLAY, HENRY E. HOLLINSHEAD, CLIFTON D. GREEN, JR., MALCOLM C. HURSEY, HIRAM C. ADAMS, JAMES H. LEE, SR., CHARLES M. LANFORD, MARY R. MILLER, ALFRED WILLIAMS, Commissioners of North Charleston Public Service District; North Charleston Public Service District, and BRANFORD HEAPE, *Appellants,*

and

JAMES B. EDWARDS, Governor of the State of South Carolina; G. P. CALLISON, RUBEN L. GRAY, ZILLA HINTON, SYLVIA A. McCULLOUGH, and MARGARET TOWNSEND, Members of the South Carolina Election Commission; DONALD INFINGER, ROBERT LIGHTHART, JR., SOLOMON MORSE, JR., HELEN CLAWSON, CURTIS INABINETT, Members of the Charleston County Election Commission, ——— *Defendants,*

-*v*-

JOSEPH P. RILEY, JR., Mayor of the City of Charleston, and
J. RUTLEDGE YOUNG, JR., JEROME KINLOCH, DANIEL L. RICHARDSON, HILDA HUTCHINSON JEFFERSON, ARTHUR W. CHRISTOPHER, BRENDA C. SCOTT, ROBERT I. FORD, GEORGE A. Z. JOHNSON, JR., MARY R. ADER, JAMES B. MOORE, JR., W. L. STEPHENS, JR., and HENRY E. GRIMBALL, Members of the City Council of the City of Charleston, *Third Party Defendants.*

Appeal from the United States District Court for the District of South Carolina, Charleston Division. Robert W. Hemphill,

---

Argued January 9, 1978 Decided March 29, 1978

Before HAYNSWORTH, Chief Judge, and BUTZNER and HALL, Circuit Judges.

David G. Jennings (Goodstein & Jennings on brief) for appellants; Armand Derfner (Epstein, McClain & Derfner; William B. Regan, Corporation Counsel, City of Charleston; Robert N. Rosen, Assistant Corporation Counsel, City of Charleston on brief) for appellees.

BUTZNER, Circuit Judge:

The questions for decision are whether a South Carolina statute conditioning the holding of an annexation election upon a majority vote by the freeholders in the area to be annexed violates the fourteenth amendment to the United States Constitution, and whether the challenged portions of the statute are severable from the remainder. The district court found the challenged provisions unconstitutional and severable. We affirm.

I

As one of several methods of annexation, the South Carolina Code provides that proceedings may be initiated by a petition signed by 15 percent of the freeholders in the area seeking to be annexed. S. C. Code §5-3-160 (1976).[1] Upon certification of this petition by the governing council of the annexing municipality, a majority of the freeholders in the area proposed for annexation must, "[a]s a prerequisite to the annexation election . . .," approve the change in a referendum. S. C. Code §5-3-170 (1976). An effective annexation proceeding also requires approval by the registered voters in both the territory to be annexed and the annexing municipality. The freeholder referendum may precede or accompany the annexation election. In the latter instance, two voting boxes are maintained at the polling places in the area to be annexed; freeholders alone vote in one, and all registered voters, including freeholders, vote in the other. S. C. Code §5-3-180 (1976).[2]

---

[1] In the 1962 Code, which was in effect when this action arose, these sections were numbered S. C. Code §§47-19.11 through 19.19 (1962).

[2] Section 5-3-240 of the South Carolina Code, in defining a freeholder, includes corporations and tenants. At oral argument we were told that the law has been construed to allow a freeholder a vote for each piece of property he owns.

A freeholders' referendum and an annexation election were held simultaneously to determine whether the Garden Kiawah area should be annexed to the City of Charleston. The registered voters in the city and Garden Kiawah approved the annexation, but the freeholders of Garden Kiawah defeated it. The City of Charleston and voters from the city and Garden Kiawah (city) promptly filed suit against county officials and others (county), challenging the constitutionality of the freeholder referendum. Since all other statutory requirements for annexation had been fulfilled, the city sought an order validating the annexation.

On cross motions for summary judgment, the district court ruled that the freeholder referendum violated the equal protection clause of the fourteenth amendment. It held that annexation was a matter of the most pervasive public interest and that South Carolina promoted no compelling state interest by establishing a freeholder referendum that burdened the general franchise granted to South Carolina registered voters on annexation questions. The court also found that the portions of the freeholders' referendum were severable, that the remainder could stand intact, and that the annexation had been legally accomplished.

II

In Kramer v. Union Free School District, 395 U.S. 621 (1969), the Supreme Court held that a restriction of the vote in school district elections to owners and lessees of taxable realty and to parents and custodians of children enrolled in the public schools violated the equal protection clause of the fourteenth amendment. Limitations of the franchise to property taxpayers in municipal bond elections were struck down on the same grounds in Cipriano v. City of Houma, 395 U.S. 701 (1969), and Phoenix v. Kolodziejski, 399 U.S. 204 (1970). In Hill v. Stone, 421 U.S. 289 (1975), the Court declared unconstitutional a Texas statute allowing only those otherwise qualified voters

who had registered taxable property to vote in municipal bond elections. In that case, 421 U.S. at 297, the Court summarized its holdings:

> The basic principle expressed in these cases [*Kramer, Cipriano, and Phoenix*] is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.

The county argues that the referendum, even when held simultaneously with an election, is not part of the election. It points out that the statute makes the freeholders' referendum a condition precedent to the actual election and that, consequently, the referendum does not burden the franchise in that election. While the referendum in form may be a condition precedent to the actual election, in effect it grants to some individuals — who are identified on the basis of ownership of realty — the right to nullify a vote for annexation by the electorate at large. Although the mechanics of the Texas "dual box election procedure" declared unconstitutional in *Hill* differ from South Carolina's, the wrongful grant of power to property owners is the same. The statutes of both states create property-based classifications of voters in an election of general interest and empower those with property to override the votes of those without. It is this restriction of the effective franchise to a property owning class — not the mechanics of accomplishing the restrictions — that offends the equal protection clause. *See* Hill v. Stone, 421 U.S. at 298.

The county also relies on Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), which upheld a state annexation statute against a variety of constitutional challenges and characterized the state's power over municipal corporations as nearly absolute. But subsequent decisions have shown that the exercise of this

power must conform to the Constitution, at least where voting is concerned. *See* Lockport v. Citizens for Community Action, 430 U.S. 259, 264-68 (1977); Gomillion v. Lightfoot, 364 U.S. 339 (1960); *cf.* Perkins v. Matthews, 400 U.S. 379, 388-90 (1971). Of course, South Carolina need not grant anyone the right to vote on annexation; similarly, the plaintiffs in *Hill*, *Kramer*, *Phoenix*, and *Cipriano* could assert no federal constitutional right to vote on the matters at issue in those cases. But once the right to vote is established, the equal protection clause requires that, in matters of general interest to the community, restriction of the franchise on grounds other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest. Hill v. Stone, 421 U.S. at 297.

The Supreme Court has distinguished elections of special interest from elections of general interest. Issues of special interest involve limited purposes which so disproportionately affect an identifiable group of voters that a state may restrict the franchise to them or give their votes special weight. Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 728 (1973) (water storage district).[3] In contrast, normal governmental functions present questions of general interest to which the requirement of an unrestricted electorate prescribed by *Cipriano*, *Phoenix* and *Hill* applies. *See* Hill v. Stone, 421 U.S. at 295-298; Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. at 726-30.

A change in the entire structure of local government is a matter of general interest. Annexation will affect municipal services that every citizen receives — whether or not he is a freeholder. The district court found that this annexation "not only involves changes in taxation, police, and fire protection,

[3]The Supreme Court noted that the water storage district at issue in *Salyer Land Co.* did not exercise normal governmental authority. It did not have a fire department or police, and it provided no other general public services "ordinarily financed by a municipal body." 410 U.S. at 728-29.

sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself." Therefore, a property-based classification of voters is of no less constituional significance in an annexation referendum than when the question is the issuance of municipal bonds or the details of operating a school system.

We agree with the district court that the county has not demonstrated that there are any differences in the impact of annexation on freeholders and non-freeholders which amount to a compelling state interest justifying an inequality in the franchise. The chief difference is the immediate and direct burden of property taxes. But the Supreme Court has held that this is an insufficient basis for restricting the franchise to property owners. Phoenix v. Kolodziejski, 399 U.S. at 210-11; *accord*, Lockport v. Citizens for Community Action, 430 U.S. 259, 267-68 (1977) (dicta; annexation).

The district court, relying primarily on Cothran v. West Dunklin Public School District, 189 S.C. 85, 200 S.E. 95 (1938), and Gordon v. Executive Committee of the Democratic Party, 335 F. Supp. 166 (D. S.C. 1971), found that the unconstitutional portions of the South Carolina annexation statute were severable from the remainder, and it upheld the validity of the annexation election under the constitutional portions of the statute. We find no error in this interpretation of the South Carolina law of severability. Those portions of the statute requiring voters in the municipality and in the area to be annexed to approve the change are constitutional. Lockport v. Citizens for Community Action, 430 U.S. at 271-73 (1977).

The judgment is affirmed.

HAYNSWORTH, Chief Judge, dissenting:

For the reasons ably stated by Judge Butzner for the majority, I agree that this annexation procedure as applied is

unconstitutional. I dissent, however, from the conclusion that the statutory provisions are severable and from the judgment upholding the election solely on the basis of the vote of the electors.

The legislature of South Carolina has shown an extraordinary concern for the interests of property owners in areas sought to be annexed by municipalities. The requirement of a petition by fifteen percent of the property owners in the annexed area as a pre-condition of any vote by electors or property owners is a clear and persuasive indication of it. The requirement that a majority of property owners vote in favor of the annexation provides a further conclusive indication of the legislature's desire to give property holders in the annexed area an effective veto over any annexation. Severing the property holder vote from the statute would completely undermine the intended operation of the statutory scheme. Indeed, it seems plain to me that the legislature was firmly of the opinion that what happened in this case should not be allowed to happen.

This annexation proceeding did not arise out of a movement by residents of the area sought to be annexed to have the area annexed by the City of Charleston. It began with the City of Charleston and arose out of its perceived need to annex a generally industrialized area with few residents in order to enhance the revenues of the City of Charleston without a comparable increase in its expenditures. The City first considered an attempt to annex a larger area, but cut off a portion of the area initially considered to enhance the probability that a vote of the relatively few residents of the remaining area would be cast in favor of the annexation. The vote of the electors residing in the City of Charleston was easily won, of course, because annexation of this generally industrial-commercial area would enlarge the public funds available for expenditure within the old limits of the City of Charleston.

While I agree that as applied the particular statutory scheme

is unconstitutional, I would hold that a legal annexation was not effected by the vote, leaving further annexation proceedings to be had under any statute which may be enacted subsequently by the South Carolina Legislature.

APPEAL FROM the United States District Court for the District of South Carolina.

THIS CAUSE came to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed
~~May 1, 1978~~
March 29, 1978

s/William K. Slate, II
Clerk

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Haynsworth, Judge Butzner, and Judge Hall.

For the Court,

Filed
~~March 29, 1978~~
May 1, 1978

s/William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2028

MARION HAYWARD, *et. al* ——————— *Appellees*

-vs.-

CECIL D. CLAY, *et. al.* ——————— *Appellants*

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Haynsworth, Judge Butzner, and Judge Hall.

For the Court,

Filed
May 1, 1978

s/William K. Slate, II
Clerk

APPENDIX B

Judgment and Opinions of District Court

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

Civil Action
No. 76-2304

MARION HAYWARD, DELORES GRANT, NANCY LITTLE, LAWRENCE M. LIBATER, J. PHILLIPS NOBLE, JR., and the City of Charleston, _____ *Plaintiffs,*

v.

JAMES B. EDWARDS, Governor of the State of South Carolina;

G. P. CALLISON, RUBEN L. GRAY, ZILLA HINTON, SYLVIA A. McCULLOUGH, and MARGARET TOWNSEND, Members of the South Carolina Election Commission;

DONALD INFINGER, ROBERT LIGHTHART, JR., SOLOMON MORSE, JR., HELEN CLAWSON, CURTIS INABINETT, Members of the Charleston County Election Commission;

CECIL D. CLAY, HENRY E. HOLLINSHEAD, CLIFTON D. GREEN, JR., MALCOLM C. HURSEY, HIRAM C. ADAMS, JAMES H. LEE, SR., CHARLES M. LANFORD, MARY R. MILLER, ALFRED WILLIAMS, Commissioners of the North Charleston Public Service District;

North Charleston Public Service District; and BRANFORD HEAPE, _____ *Defendants.*

and

CECIL D. CLAY, HENRY E. HOLLINSHEAD, HIRAM C. ADAMS, JAMES H. LEE, SR., MARY R. MILLER, and ALFRED WILLIAMS, ___ *Defendant-Third Party Plaintiff,*

v.

JOSEPH P. RILEY, JR., Mayor of the City of Charleston,

and

J. RUTLEDGE YOUNG, JR., JEROME KINLOCH, DANIEL L. RICHARDSON, HILDA HUTCHINSON JEFFERSON, ARTHUR W. CHRISTOPHER, BRENDA C. SCOTT, ROBERT I. FORD, GEORGE A. Z. JOHNSON, JR., MARY R. ADER, JAMES B. MOORE, JR., W. L. STEPHENS, JR., and HENRY E. GRIMBALL, Members of the City Council of the City of Charleston _____

Third Party Defendants.

This case involves the constitutionality of various sections of the South Carolina Code which provide for municipal annexations.[1] On November 23, 1976, an election was held to determine whether or not an area of Charleston County known as "Garden Kiawah" should be annexed by the City of Charleston. The election procedure involved a separate "freeholder box", where only property owners could vote. Under the statutes, the annexation must be independently approved by three groups of voters; the freeholders; the registered electors (including freeholders) and the registered voters in the annexing area (in this case, the City of Charleston). The registered voters both in the City and in the area to be annexed approved the annexation while the freeholders within

---

[1] S. C. Code Ann. § 47-19.11 (1975 Cum. Supp.) provides: Alternate method when area adjacent, - - In addition to the method of initiating an annexation election provided for in § § 47-12 through 47-14, cities and towns may annex adjacent territory as follows: Upon presentation to the city or town council of a petition signed by twenty-five percent of the freeholders resident in the area or territory proposed to be annexed, the city or town council may forthwith certify such fact to the county commissioners of election together with a description of the territory proposed to be annexed; and, if so certified, the county commissioners of election shall order a referendum and an election to be held as herein provided. No such territory shall be annexed until such a certification is made by the city or town council and a referendum and election are held. Except, however, with respect to any city or town having a population of twenty-five thousand, or more, said petition shall contain only fifteen percent, or more, of said freeholders resident in the area or territory proposed to be annexed.

S. C. Code Ann. § 47-19.13. Referendum and elections must approve annexation; ballot boxes. -- In cases where the referedum is held prior to the election, if a majority of the freeholders voting in such referendum do not approve the proposed annexation, the election shall not be held. In cases where the referendum and the election are held simultaneously, separate boxes shall be maintained to receive the votes of the freeholders voting in the referendum and those of the registered electors voting in the election. In order for an annexation to be validly effected, a majority of the freeholders voting in the referendum must approve the annexation; and a majority of the registered electors voting in the election must approve the annexation, both within the territory proposed to be annexed and within the corporate limits of the municipality.

Garden Kiawah rejected it. The City, and various individual plaintiffs within the City and Garden Kiawah, are now challenging the constitutionality of the separate freeholders referendum in an attempt to have it declared invalid and have the annexation declared valid. The plaintiffs argue that the franchise in the freeholders' referendum is restricted to landowners[2] and that ownership of property is a constitutionally impermissible voter qualification.

The Supreme Court of the United States has ruled that in an election of general interest, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack. In *Kramer v. Union Free School District No. 15*, 395 U. S. 621, 23 L.Ed.2d 583 (1969), the Court struck down an election law limiting the franchise in local school elections to persons who own or lease taxable real property in the school district or who had children enrolled in the public schools. Likewise, in *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.Ed. 2d 647 (1969), and in *City of Phoenix v. Kolodziejski*, 399 U.S.

[2] S. C. Code Ann. § 47-19.15 (1975 Cum. Supp.) provides: County auditor to furnish list of freeholders to commissioners of election. - Not later than twenty days prior to the freeholders referendum provided herein, the county auditor shall furnish to the county commissioners of election a list of freeholders showing the names of the freeholders owning the property within the territory proposed to be annexed as shown by the county tax records. The county commissioners of election shall use this list to determine what persons are eligible to vote in the referendum.

S. C. Code Ann. [2] 47-19.19. Freeholder defined in § § 47-12, 47-14 and 47-19.11 to 47-19.19. For the purposes of § § 47-12, 47-14, and 47-19.11 to 47-19.19, a "freeholder" is defined as any person twenty-one years of age, or older, and any firm or coropation, who or which owns legal title to a present possessory interest in real estate equal to a life estate or greater (expressly excluding lease holds, easements, equitable interests, inchoate rights, dower rights and future interests) and who owns, at the date of the petition or of the referendum, at least an undivided one-tenth interest in a single tract and whose name appears on the county tax records as an owner of real estate.

204, 26 L.Ed.2d 523 (1970), the Court invalidated statutes which placed property qualifications for voting on the electors in elections for the approval of municipal bonds.

The Supreme Court has also had the opportunity to deal directly with the question of a system of dual boxes, one for general electors and one for freeholders, in the case of *Hill v. Stone*, 421 U.S. 289, 44 L.Ed.2d 172 (1975), rehearing denied 422 U.S. 1029, 44 L.Ed.2d 686. That case involved a dual ballot box system whereby all electors who had "rendered property for taxation" were allowed to vote in one box and electors without property of record casts their ballots in a separate box. In order for the bond issue in question to pass, approval was required by both boxes individually and by both boxes in the aggregate. It should be noticed that the balloting procedure in *Hill v. Stone*, supra, differs from that of the present case in that, in *Hill v. Stone*, only electors who had rendered property voted in the renderers box and only electors who had not rendered property voted in the nonrenderers box. In the present case, all registered electors, including property owners, vote in the regular annexation election while only the property owners may vote in the freeholders referendum. The court, in *Hill v. Stone* characterized the holdings of the *Kramer*, supra, and *Cipriano*, supra thusly:

> The basic principle expressed in these cases is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.

The court went on to find that the bond issue in question, involving a public library, was a general bond issue and a matter of general interest to the public rather than of special interest to a particular group. Although there are minor factual differences between the *Hill* case and the case before the court,

there is no rational or logical way to distinguish the two cases either legally or factually.

The South Carolina statutory annexation procedure is essentially a composite of three elections. One for registered electors within the area to be annexed; one for freeholders within the area to be annexed and one for registered voters within the annexing area. The annexation must be approved in all three elections or it will fail. The validity of the annexation may rise or fall upon the decision of any one election, including the freeholders' referendum. Success in the freeholders' election is essential to the annexation procedure and the franchise in the freeholders referendum is limited to property owners. As the Supreme Court held in *Hill v. Stone*, supra, and the above cited cases which form the basis for that opinion, a property ownership qualification in an election of general interest cannot stand unless the state can demonstrate that the classification serves a compelling state interest. This the state has failed to accomplish.

The defendants essentially oppose the plaintiffs' motion for summary judgment on two grounds. First, they argue that the Supreme Court has historically allowed state legislatures wide latitude in structuring election procedures. In *Hunter v. City of Pittsburgh*, 207 U.S. 161, the Supreme Court, speaking of the broad discretion granted to the states in annexation matters, said

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . The State . . . at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of citizens, or even against their protest.

The defendants also cited the case of *Thompson v. Whitley*, 344 F. Supp. 480 (E.D. N.C. 1972) which involved an annexation procedure where the residence of the annexed area were completely denied the right to vote on annexation issues if their areas were contiguous to cities with populations within certain ranges. The Court in that case held that the right vote within the annexed area was not fundamental in that it only related indirectly to participation in representative government. This court cannot agree with that conclusion in that there is almost no conceivable type of election which could have a more profound effect on the political life of a community than an annexation election. While it might possibly be permissible to deny all persons within the annexed area the right to vote on such annexation, in the present case some some of the electors were allowed to vote once and some were allowed to vote twice. The differentiating criteria of the ownership of property and that criteria it is invalid.

The defendants also contend that the annexation election is a "special interest" eletion and is therefore within the exception to the ban on property qualifications, as was outlined in *Salyer Land Co. v. Tulare Water Storage District*, 410 U.S. 719 (1973) and *Associated Enterprises, Inc. v. Toltec Watership Improvement District*, 410 U.S. 743 (1973). The statutes in question in both those cases involved elections for the establishment and management of water storage districts to provide irrigation to arid agricultural areas. Not only were the elections limited to landowners but the vote was weighted according to acreage owned. The Court gave the statutes constitutional approval due to the limited purpose of the water storage districts and the disproportionate effect on landowners. The limited purpose of the water storage districts

may be illustrated by the fact that the district's only purpose was the acquisition, storage and distribution of water for irrigation. These districts served no other public service needs and served no political functions whatever. As to the disproportionate effect on landowners, it was apparent from these cases that all costs of district projects were assessed directly against the land in proportion to the benefits received, that charges for services rendered were collectible directly from landowners and that such charges became a lien on the property involved.

While *Sawyer* and *Associate Enterprises* deal with a limited purpose election, the present case deals with annexation, a decision of general political interest which will have a pervasive effect upon every citizen in the area to be annexed. Annexation not only involves changes in taxation; police, and fire protection, sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself. It is not a special limited purpose election as found in the water district cases, but rather it is a general interest election which necessitates an equal voice for every participant.

Therefore, for the foregoing reasons, Sections 46-19.11 and 19.12, 19.13, 19.14, 19.15, 19.16, 19.19 are in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States insofar as they provide for a separate freeholder referendum and annexation election or make any provision for the implementation of such referendum. All portions of such statutes which do not refer to the separate freeholder referendum are severable and should remain valid and in tact.

Furthermore, the defendants shall consider the "Garden Kiawah" annexation to have been approved in the election of November 23, 1976, and the defendants are enjoined from interfering with the City of Charleston's annexation of the

"Garden Kiawah" annexation area as effected by the votes cast under the constitutionally permissible procedure in the November 23rd election.

Defendants' request for a new election is denied, as a new election, but for the existence of the impermissible freeholders' referendum, would be identical to the original. To order a new election in a case such as this would encourage the electorate to disregard electoral procedures which they believed questionable and go to the courts instead of the polls. By allowing the valid election to stand, the electors are encouraged to first exercise the franchise and then go to the courts if they feel their constitutional rights were disregarded.

The defendant James B. Edwards' motion to dismiss is granted in that all parties agreed at the hearing that defendant Edwards, as Governor of the State of South Carolina, was not a necessary and property party to this action.

AND IT IS SO ORDERED.

s/ROBERT W. HEMPHILL
United States District Judge

Columbia, South Carolina
June 9, 1977

Filed
June 9, 1977

Miller C. Foster, Jr., Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

Civil Action
No. 76-2304

MARION HAYWARD, *et. al.* _____ *Plaintiffs*

-vs-

JAMES B. EDWARDS, *et. al.* _____ *Defendants.*

AMENDMENT TO COURT'S ORDER OF JUNE 9, 1977

The defendants have filed a counterclaim, crossclaim, and third party complaint, alleging that the entire annexation procedure set up by the aforementioned statutes is unconstitutional in that it denies all registered voters in the special purpose district, except those in the area to be annexed, the right to vote in annexation elections. The defendants feel that this procedure constitutes invidious discrimination based on residence within artifically drawn lines against registered voters in the remainder of the special purpose district. Under the wide latitude given the states in structuring annexation elections under *Hunter v. City of Pittsburgh*, supra, the exclusion of a group of voters from the election would be permissible so long as the exclusion did not result from a constitutionally impermissible qualification. As has been previously discussed, residency is one of the very few constitutionally permissible voter qualifications. As such, the state is free to require that voters participating in an annexation election be residents of the areas directly affected by such

election. Therefore, the defendants' counterclaim, cross-claim and third party complaint are hereby dismissed.

AND IT IS SO ORDERED.

s/ROBERT W. HEMPHILL
United States District Judge

Greenville, South Carolina
June 16, 1977

Original Filed
June 17, 1977

Miller C. Foster, Jr., Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

Civil Action
No. 76-2304

MARION HAYWARD, *et. al.* _____ *Plaintiffs*

-vs-

JAMES B. EDWARDS, *et. al.* _____ *Defendants.*

AMENDMENT TO ORDER, DATED JUNE 9, 1977

It appears to the Court that the following should be inserted into this Court's Order of June 9, 1977

To strike the second paragraph on page seven (7) of the Order to read as follows:

The defendants', James B. Edwards, G. P. Callison, Ruben L. Gray, Zilla Hinton, Sylvia A. McCullough and Margaret Townsend, Motion for Summary Judgment is granted in that all parties agreed at the hearing that the defendants, James B. Edwards, G. P. Callison, Ruben L. Gray, Zilla Hinton, Sylvia A. McCullough and Margaret Townsend, in their respective capacities, as Governor of the State of South Carolina and as members of the State Election Commission, were not necessary and proper parties to the action.

AND IT IS SO ORDERED.

s/ROBERT W. HEMPHILL
United States District Judge

Greenville, South Carolina.
June 29, 1977

Filed
June 30, 1977

Miller C. Foster, Jr., Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

Civil Action
No. 76-2304

MARION HAYWARD, *et. al.* _____ *Plaintiffs*

-vs-

JAMES B. EDWARDS, *et. al.* _____ *Defendants.*

JUDGMENT

This action came on for hearing before the Court, Honorable Robert W. Hemphill, United States District Judge, presiding, and the Plaintiffs' Motion for Summary Judgment having been duly heard and granted,

It is Ordered and Adjudged that Summary Judgment is entered for the Plaintiffs, that defendants' counterclaim, cross-claim and third party complaint are hereby dismissed.

MILLER C. FOSTER, JR.
Clerk of Court

s/Joyce Kirby
Deputy Clerk

Dated at Columbia, South Carolina, this 17th day of June, 1977.

Original Filed
June 17, 1977

Miller C. Foster, Clerk

APPENDIX C

Statutory Provisions

CODE OF LAWS OF SOUTH CAROLINA, 1962, as Amended

47-19.11. Alternate method of annexing adjacent territory.

In addition to the method of initiating an annexation election provided for in Sections 47-12 through 47-14, cities and towns may annex adjacent territory as follows: Upon presentation to the city or town council of a petition signed by twenty-five percent of the freeholders resident in the area or territory proposed to be annexed, the city or town council may forthwith certify such fact to the county commissioners of elction together with a description of the territory proposed to be annexed; and, if so certified, the county commissioners of election shall order a referendum and an election to be held as herein provided. No such territory shall be annexed until such a certification is made by the city or town council and a referendum and election are held. Except, however, with respect to any city or town having a population of twenty-five thousand, or more, said petition shall contain only fifteen percent, or more, of said freeholders resident in the area or territory proposed to be annexed.

47-19.12. Referendum required in territory proposed to be annexed

As a prerequisite to the annexation election provided for in Section 47-19.11, there shall be held a referendum (either prior to or simultaneous with the annexation) in which all freeholders owning property in the territory proposed to be annexed shall be entitled to vote.

47-19.13. Referendum and election must approve annexation; ballot boxes.

In cases where the referendum is held prior to the election, if a majority of the freeholders voting in such referendum do not approve the proposed annexation, the election shall not be held. In cases where the referendum and the election are held simultaneously, separate boxes shall be maintained to receive

the votes of the freeholders voting in the referendum and those of the registered electors voting in the election. In order for an annexation to be validly effected, a majority of the freeholders voting in the referendum must approve the annexation; and a majority of the registered electors voting in the election must approve the annexation, both within the territory proposed to be annexed and within the corporate limits of the municipality.

47-19.14. Notice of referendum or election required; polling places.

No annexation referendum or election shall be initiated pursuant to Sections 47-19.11 to 47-19.19 unless a notice of the referendum and election shall have been inserted in a newspaper of general circulation within the municipality and the territory proposed to be annexed for once a week for at least four successive weeks, the first such notice to be given at least sixty days prior to the date of the election. The notice shall state the purposes of the election, the date, and the location of the various voting places. There shall be provided at least one polling place within the area sought to be annexed.

47-19.15. County auditor required to furnish list of freeholders to commissioners of election.

Not later then twenty days prior to the freeholders referendum provided herein, the county auditor shall furnish to the county commissioners of election a list of freeholders showing the names of the freeholders owning the property within the territory proposed to be annexed as shown by the county tax records. The county commissioners of election shall use this list to determine what persons are eligible to vote in the referendum.

47-19.16. Subsequent election after defeat of annexation election.

When an annexation election is defeated either by the voters inside the municipality concerned or within the territory proposed to be annexed, or both , another annexation election

within the territory to be annexed shall not be initiated within a period of twenty four months from the date upon which the voting took place.

47-19.19. "Freeholder" defined for purposes of pertinent provisions.

For the purposes of Sections 47-12,47-14, and 47-19.11 to 47-19.19, a "freeholder" is defined as any person twenty-one years of age, or older, and any firm or corporation, who or which owns legal title to a present possessory interest in real estate equal to a life estate or greater (expressly excluding leaseholders, easement, equitable interests, inchoate rights, dower rights and future interests) and who owns, at the date of the petition or of the referendum, at least an undivided one-tenth interest in a single tract and whose name appears on the county tax records as an owner of real estate.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-351

CECIL D. CLAY, *et al., Petitioners,*

vs.

MARION HAYWARD, *et al., Respondents.*

BRIEF IN OPPOSITION TO CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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No. 78-351

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vs.

MARION HAYWARD, *et al.*, *Respondents*.

BRIEF IN OPPOSITION TO CERTIORARI

The writ of certiorari should be denied because this case presents no issues worthy of review by this Court.

This case involves an application of the familiar proposition that general-purpose elections may not be limited to freeholders (*i.e.*, landowners). The district court held that South Carolina's municipal annexation statute was unconstitutional on these grounds, and the court of appeals affirmed. In addition, based on its analysis of state law, the district court held that the freeholder referendum was severable from the remaining, constitutional portion of the annexation statute, and the court of appeals affirmed this portion of the judgment as well. The lower courts were correct as to both questions, one of which (the constitutional question) is a familiar one that does not warrant further examination in this case, while the other (the severability question) is no more than a question whether the federal courts have correctly construed state law.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE SEPARATE FREEHOLDER BOX VIOLATES THE EQUAL PROTECTION CLAUSE AS A PROPERTY QUALIFICATION ON THE RIGHT TO VOTE

The fourteenth amendment to the Constitution of the United States bars a state from conditioning the right to vote upon ownership of wealth or property.[1] That principle has been stated and restated by this Court no fewer than six times in the past few years (not counting per curiam opinions):

Hill v. *Stone*, 421 U.S. 289 (1975);

City of Phoenix v. *Kolodziejski*, 399 U.S. 204 (1970);

Turner v. *Fouche*, 396 U.S. 346 (1970);

Cipriano v. *City of Houma*, 395 U.S. 701 (1969);

Kramer v. *Union Free School District*, 395 U.S. 621 (1969);

Harper v. *State Board of Elections*, 383 U.S. 662 (1966).

The South Carolina Supreme Court has likewise held, in *Cothran* v. *West Dunklin Public Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95 (1938), that a statute limiting the right to vote to property owners violates the State Constitutional provisions regulating suffrage.

The features of the freeholder referendum required under the South Carolina annexation law are even more

[1] Contrary to suggestions in the Petition for Certiorari, *e.g.*, p. 19, homeowners are *not* penalized or excluded. As the district court said, "in the present case, all registered electors, including property owners, vote in the regular annexation election, while only the property owners may vote in the freeholders referendum." Pet. App. p. B-3.

restrictive than the property qualifications struck down in the earlier cases. In this case, eligibility is limited to owners of *real* property. In *Hill* and *Cothran*, the property qualification could be met by owning and reporting for taxes *any* property, real or personal, even "a pair of shoes or a bicycle," 421 U.S. at 303 (Rehnquist, J., dissenting). A majority of this Court rejected even this minimal curb on voting, and the dissenters in *Hill* indicated that had it been a real property qualification they too would have held it "impermissible." 421 U.S. at 308.

The district court correctly applied these familiar rules when it held that "in the present case some of the electors were allowed to vote once and some were allowed to vote twice. The differentiating criterion is property and that criterion is invalid." Pet. App. p. B-5.

The appellants argue that this case is different from the others because annexations are not like bond issues, Petition, pp. 18-19, or because non-freeholders are allowed to vote in the voters' box. Petition, pp. 19-20. The courts below addressed both these arguments, and correctly rejected them:

(1) This Court has acknowledged the possibility of a property qualification in elections of purely special interest to property holders, but that exception has been applied only in the case of water storage districts, having no governmental powers other than the proprietary ones of acquiring and distributing water for agricultural purposes. *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973); *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement District*, 410 U.S. 743 (1973). This exception has

been rejected in cases involving school district elections (*Kramer*), revenue bonds (*Cipriano*), and general obligation bonds (*Phoenix, Hill*). The *Hill* case contains an extended analysis of the limited nature of the "special interest election" exception, 421 U.S. 298-301. From this discussion it is clear that the election in this case, which decides whether the people of an area will become part of the neighboring city—and thereby subject to its laws and its government, and entitled to its services—is perhaps the clearest kind of *general* interest election that one could imagine:

> ". . . the present case deals with annexation, a decision of general political interest which will have a pervasive effect upon every citizen in the area to be annexed. Annexation not only involves changes in taxation, police and fire protection, sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself." Pet. App. p. B-6.

(2) This case, like *Hill* v. *Stone,* involves a dual-box election. That is, non-freeholders are "allowed" to vote, but their votes cannot be decisive since there is a simultaneous election for which a property qualification is imposed. "Success in a freeholders' election is essential to the annexation procedure and the franchise in the freeholders referendum is limited to property owners." Pet. App. p. B-4. The petitioners refer to the freeholders referendum as part of the "qualification" procedure, as if that term made it less of an election. But the essential criteria of an election—ascertaining the preference of a majority of those casting ballots—are present, and the district court was therefore correct in treating the freeholders referendum like any other

election.[2] The *Hill* Court held that the existence of the renderers box disfranchised those who were ineligible for it, and a like analysis requires invalidation of the freeholders box in this case.[3]

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE UNCONSTITUTIONAL PROVISIONS SHOULD BE SEVERED FROM THE VALID PORTION OF THE STATUTE

In addition to enjoining further enforcement of the freeholder referendum provision, the district court also upheld the election that had already taken place, because the constitutional portions of the state annexation procedure (the registered voters' election) had been duly carried out. In reaching this result, the district court made an explicit finding that the freeholder provision could be severed from the remainder of the statute. That finding, made by an experienced judge who was formerly a member of the South Carolina General Assembly, and affirmed by the court of appeals, is entitled to great weight. See *Bishop* v. *Wood,* 426 U.S. 341, 345-46 (1976).

The holding that the statute was severable conformed to the rule followed by the South Carolina Supreme Court itself in *Cothran* v. *West Dunklin Public School*

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[2] The South Carolina Supreme Court likewise uses the terms "election" and "referendum" interchangeably. E.g., Murphree v. Mottel, 267 S.C. 80, 84, S.E.2d 36, 37 (1976).

[3] Petitioners also cite statutes from other states dealing with non-elective freeholder *petition* requirements. Those provisions of course are not involved here. As the court of appeals correctly recognized:

> "Of course, South Carolina need not grant anyone the right to vote on annexation; . . . But once the right to vote is established, the equal protection clause requires that, in matters of general interest to the community, restriction of the franchise on ground other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest." Pet. App. p. A-4.

District, supra.[4] There, a bond issue had been carried in Greenville County, S.C., by a majority of the registered voters, even though the authorizing statute limited the vote to property taxpayers only. The South Carolina Supreme Court held the property taxpayer limitation unconstitutional but upheld the remainder of the law authorizing the bond issue election and held the election valid:

> "It [the provision limiting the vote to property taxpayers] therefore had no application to the election held on the 19th of September, 1938. The election was legal and valid, and the bonds so voted may lawfully be issued." [189 S.C. at 91, 200 S.E.2d at 97]

Severability appears to be the universal rule in freeholder cases. The order in *Hill* v. *Stone, supra,* was one

[4] Although the District Court here did not elaborate on its holding of severability in its initial order, it subsequently gave a further discussion in an order enjoining the relitigation of this case in state court:

"While the South Carolina Supreme Court has not construed these statutes directly, it has spoken in an extraordinarily similar case, where it held an unconstitutional freeholder provision severable from the rest of bond issue election law, and held a bond issue valid after it had been approved by the registered voters only. Cothran v. West Dunklin Public School District, 189 S.C. 85, 200 S.E. 95 (1938). See also Gordon v. Democratic Executive Comm. of Charleston, 335 F. Supp. 166 (D.S.C. 1972), an election case in which this court held that statutes are to be severed to save the constitutional portions whenever possible. This policy is especially strong in voting cases so that the will of the people, as expressed in the Garden Kiawah annexation election, will not be nullified.

"A similar issue arose in Tornillo v. Dade Co. School Board, 458 F.2d 194 (5th Cir. 1972), where the court of appeals held that the statute should have been severed on the basis of state law."

[Hayward v. Clay, C.A. No. 76-2304, unreported order of Nov. 26, 1977, p. 10 n. 8.]

severing the unconstitutional freeholder provision, and upholding the election. *Stone* v. *Stovall,* 377 F. Supp. 1016, 1024 (N.D. Texas 1974). See also *State* v. *City of Miami Beach,* 245 So.2d 863 (Fla. 1971); *Board of Educ.* v. *Maloney,* 83 N.M. 167, 477 P.2d 605 (1970). We know of no case to the contrary.

Appellants cite a number of South Carolina cases which make general statements on the subject of severability, but those cases only emphasize that the question is not one for review by this Court. Moreover, the cases make it clear that South Carolina law favors severability, as shown by *Parker* v. *Bates,* 216 S.C. 52, 56 S.E.2d 723 (1949), where the South Carolina law on severability is discussed for several pages concluding with the observation that severability "is the rule rather than the exception." 216 S.C. at 70, 56 S.E.2d at 731. See also *Cox* v. *Bates,* 237 S.C. 198, 116 S.E.2d 828 (1960). The district court correctly applied these state law principles; the court of appeals affirmed; and this Court should leave the issue in repose.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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